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ST. THOMAS MORE SOCIETY REPORTS

(Consistent with the policies of The Catholic University of America Law Review, summaries of papers read at the annual meeting of the St. Thomas More Society will be published from time to time. One summary is included in this issue.)

JUSTICE HOLMES and CHANCELLOR MORE

By

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Oliver Wendell Holmes has been dead for seventeen years. Thomas More has been dead for four hundred and seventeen years. Holmes, the product of mid-nineteenth century America, is a vital, penetrating force in our current development of law. More, the last great product of the Medieval Common Law, is a saint of the Church, but his influence in modern jurisprudence is slight.

There are signs that Holmes is passing his zenith and that More is emerging from the shadows of four centuries.

Holmes and More held radically different theories of law. Holmes conceived of law as being an instrument for the accomplishment of an end fixed by the law-maker with no predictable limits to what the law might do. Subjects must obey the law or suffer the punishments fixed by the State. Those under the law have no choice but to submit, for, just as there is no restraint on the law-maker, there is no appeal from his dictates.

More had a vision of law, irreconcilable with that of Holmes. More believed that the prime function of law is to lead men to their salvation. He said that the authority of the state is circumscribed by the law of God. There are certain areas into which man-made law may not reach.

At the present moment we are in the process of making our choice between these two theories. For the past fifty years we have been in one of the most significant cycles of deliberate and creative law making in the history of jurisprudence. Our country, at the pinnacle of Western civilization, is moving toward a new synthesis of law, seeking solutions to the complex problems of today, and to the still greater difficulties of tomorrow.

Many of the problems of the twentieth century cannot be solved within the patterns of an ancient system of law. The very difficulty of the solutions makes new ideas, new concepts of jurisprudence, attractive to those charged with law-making. When new ideas point the way to the immediate resolution of concrete cases, they have a great appeal.

Holmes, in helping to mould the new ideas, excised the core of truth from the law. His denial of God's plan in the universe was a denial of man's rights against state authority.

When the truth is removed from the area of legislation and court decision, the law becomes free to direct the actions of men according to whatever standard the law itself creates, unimpeded by the limitations of natural rights and natural duties. If the law-makers then believe that God should be denied a place in the public acts of the state, that euthanasia should be legalized, that eugenics demands selective human breeding, they will be free to legislate, to adjudicate, and, if necessary, to change the Constitution.

In his lifetime Holmes said that there are no restraints on what law may accomplish except the will of the *dominant* group in the community. Such a group might or might not be a majority, but whatever its size, its wishes will become law if it, the dominant group, is able to make its wishes effective.

This is a startling opinion to find in one who is having such a marked effect on the law structure of our country. Holmes' influence, which was great in his lifetime, has increased as his disciples in jurisprudence have grown in stature and in influence.

One of these, Justice Frankfurter of the United States Supreme Court, once said of Holmes:

He above all others has given the directions of contemporary jurisprudence.

The late Justice Cardozo described Holmes:

He is today, for all students of the law and for all students of human society, the philosopher and the seer—the greatest of our age in the domain of jurisprudence and one of the greatest of the ages.

Justices Frankfurter and Cardozo, have occupied the highest judicial positions in the land, but Holmes' followers are found today not only in the courts but also in the chambers of Congress, in the state legislatures, in the law schools, in offices and conference rooms.

His influence is great because he is a prophet to our generation, because he states a philosophy which a significant number of our contemporaries want to hear. He is pre-eminent because he has pointed the direction in which a dominant group *in the area of law-making* wants to move. They seek to destroy the concept of Natural Law and its control over the affairs of men.

At this moment in our legal history we are making many of our decisions under the impact of Holmes' influence. In some respects the decisions already made have been ratified by a majority but there is an increasing protest against the idea that Law is supreme. We are uneasy as we stand by the shore of what appears to be a limitless ocean of state power.

The key question has yet to be answered in a manner so decisive that the result is unmistakable: Are there limits to law-making power?

Holmes said No, and he died in the honor which is saved for the great. More said Yes and he was executed by the state in humiliation and disgrace.

More went to his death under a law which Holmes would have understood and approved. This is the proposition stated by Holmes in his lifetime:

... when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want, and do they want it hard enough to disregard whatever inhibitions stand in their way.

In respect to Thomas More, the proposition would be stated in this way:

If Henry VIII, who was the dominant force in his community, wants Anne Boleyn above all else, and if his desire overrides his inhibitions, then his will becomes law, though it leads More to the scaffold.

More's refusal to comply with an act of Parliament is incomprehensible in the light of this principle. He refused to take the oath acknowledging Henry the supreme head of the Church though he knew that the dominant force could take his life for refusing. He rejected the oath because he believed that the sovereign had no authority to compel it: the state could not legislate contrary to the law of God.

More's stand did not grow out of a desire to be a martyr, nor from a wish to defy Henry, who had been his good friend and patron. More, the Common Lawyer, one time Chancellor of England, rested his case on a point of law. As he argued in defense of his refusal to take the oath, he knew that he was pleading for his life, but his plea was that a man of the law who knew that there is a point beyond which the law cannot go. Seldom in history has the conflict between two theories of law appeared so clearly and so dramatically.

To More the result was inescapable, but to Holmes it would have been senseless. It is strange that each man was right—according to his philosophy. Holmes could have looked back to that moment in 1535 when More's head rolled into a basket, and said "There goes a strong man who was mistaken. It can be demonstrated that he was wrong because there lies his head and there his body. The dominant force in the community cannot be challenged with impunity. We can't ask whether the dominant force is right or wrong, but merely, does it have the power?"

More's philosophy gave him no escape. He would not barter his soul, which he believed immortal, for a few more years of life. He would not abandon his interior conviction that he was a creature, seeking to set the world at naught and praying for grace to set his mind fast upon God.

His philosophy led him to his definition of law as many man's philosophy must do. The way in which a law-maker thinks of himself and his destiny determines what he thinks of others, those whom the law governs. Consequently the

beliefs, the objectives, the faith of those who are responsible for developing our new jurisprudence must, of necessity, be reflected in the laws which are being enacted and in the court decisions which are being made.

Holmes evaluation of himself was that of the utter skeptic. He thought of himself as no more important in the cosmic order than a grain of sand, or a baboon. He called himself a ganglion, a tumor on the Cosmos, and he prayed to be dissolved in peace.

More thought of himself as beginning, living and ending in God.

If the destiny of man is a matter of cosmic indifference and if the Law is but the medium for arriving at any fixed objective, then we may expect future laws to reflect the desires of the dominant group in the nation. In this expectation we will find the absolute which is implicit in Holmes' philosophy: the rights of the *dominated* group will cease to exist, because when the law, which now protects those rights is gone, the rights themselves will disappear.

Can we embrace a philosophy which equates law to naked power, which considers man to have no end beyond the immediate satisfactions of the day? If the proposition were put to a vote there is no doubt that a vast majority in this country would reject it. But it will not be put to a vote in those terms. Strangely, we must see the inevitability of Holmes' premise: the dominant group will determine the course of the future. Our concern then is, which group will be dominant, those who follow Holmes or those who believe with More?

In this adversary position of two great men there can be seen the conflict of the times. What we must recognize is that the conflict goes on within our own country. Unless we can resolve the question rightly for ourselves, we are in no position to lead others with rectitude. In fact it may be questioned that we have the right to lead at all, for, as Chambers, a biographer of More, said, More's principles must triumph. If they do not, the civilization of the west is doomed.